

9/25/06 - (3)

Don Johnson

From: William Solomon
Sent: Friday, September 22, 2006 4:00 PM
To: Don Johnson
Cc: Frits Riep; John Covert; mark.eisenberg@microsoft.com
Subject: Cable Division Framingham Decision

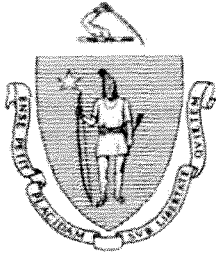
Attached.

Senior Discount issue Pages 77-81.

Upon reflection – just send the Senior Discount section to the Board of Selectmen.

Bill

9/22/2006



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF
TELECOMMUNICATIONS & ENERGY
Cable Television Division

CTV 05-2

March 22, 2006

Petition of Comcast of Massachusetts, III, Inc. on appeal of decision by Board of Selectmen of the Town of Framingham denying franchise renewal proposal

INTERLOCUTORY ORDER ON STANDARD OF REVIEW,
ADMINISTRATIVE NOTICE, AND PARTIAL SUMMARY DECISION

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-and-

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FRAMINGHAM
Respondent

b. Positions of the Parties

(1) Comcast

Comcast argues that requiring a senior discount constitutes rate regulation.²⁸⁸ Comcast notes that the Cable Division has stated that “no state law or regulation requires an operator to offer such a discount and thus, the issue is left to license negotiations.”²⁸⁹ Comcast states that state and local requirements governing rates are permissible only to the extent that they are consistent with the FCC’s rate rules.²⁹⁰

Comcast urges the Cable Division to reject Framingham’s argument that Section 623(e)(1) grants it the power to require a senior discount.²⁹¹ Comcast argues that this section provides only that senior discounts are discretionary for a cable operator. Comcast states that Section 623(d) establishes a general requirement for cable operators to maintain a “uniform rate structure.”²⁹² Comcast then argues that Section 623(e) grants the Cable Division the power to prohibit rate discrimination, but that Section 623(e)(1) provides that no government “may prohibit a cable operator from offering reasonable discounts to senior

²⁸⁸ Comcast Mot. Summ. Decision at 27.

²⁸⁹ Id., citing Investigation and Study Relative to the Adequacy and Effectiveness of Existing Licensing and Regulation of Cable Television Operations in the Commonwealth of Massachusetts (Cable Division, submitted to Massachusetts General Court, Joint Committee on Government Relations, January 1999).

²⁹⁰ Id., citing City of New York v. FCC, 486 U.S. 57, 64 (1988); Time Warner Entertainment, Co. v. FCC, 56 F.3d 151, 197, 188 (D.C. Cir. 1995); Town of Norwood v. Adams-Russell Co., 406 Mass. 604, 611–12 (1990).

²⁹¹ Comcast Opp. Framingham Mot. Summ. Decision at 37.

²⁹² Id. at 39.

citizens or other economically disadvantaged group discounts.”²⁹³ Comcast argues that while this section limits a franchising authority’s ability to preclude voluntary senior discounts, it nowhere implies a right to compel such discounts. Comcast maintains that this section should be read in contrast with Section 623(e)(2), which permits franchising authorities to “requir[e] and regulat[e] the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals.”²⁹⁴ Comcast argues that had Congress intended to leave local regulators with the authority to “require and regulate” senior discounts, it would have drafted subsection (e)(1) consistently with subsection (e)(2).²⁹⁵

(2) Framingham

Framingham asserts that negotiating a senior discount is allowable under federal law and does not constitute rate regulation.²⁹⁶ Framingham claims that its legal right to require such a discount arises from Section 623(e)(1).²⁹⁷ Framingham argues that the FCC has repeatedly found that “the specific senior rate provisions in the agreement are solely within the purview of local law.”²⁹⁸ According to Framingham, the FCC held, in Matter of Harron Communications Corp., that “[a]lthough the senior citizen discounts are required in Harron’s

²⁹³ Id.

²⁹⁴ Id.

²⁹⁵ Id.

²⁹⁶ Framingham Mem. Summ. Decision at 34.

²⁹⁷ Id. at 32.

²⁹⁸ Id., quoting In the Matter of City of Antioch, California, No. CSR-5239-R, ¶ 12 (FCC Feb. 2, 1999).

Rockland system franchises and may not have been offered . . . without a franchise requirement, the mere presence of a franchise requirement does not automatically result in a cable operator's right to recover its value as an external cost."²⁹⁹ Framingham states that the Cable Division has recognized that such discounts are allowed under federal law.³⁰⁰

Framingham claims that a senior discount is a local need that Comcast refused to address or provide explanation for its discontinuance.³⁰¹ Framingham contends that the fact that senior discounts were included in prior licenses for over 20 years demonstrates that the cost of such discounts is reasonable.³⁰² Framingham maintains that although Comcast has stated that it intends to continue the senior discount, it should not be permitted to excise the term from the franchise without a showing of hardship.³⁰³ Framingham contends that it is not required to renew a cable license agreement based on an unenforceable letter of intent.³⁰⁴

²⁹⁹ Id. at 33, quoting In the Matter of Harron Communications Corp., 15 FCC Rcd. 7901, DA 00-1002, CSB-A-0622, ¶ 9 (FCC May 5, 2000).

³⁰⁰ Framingham Opp. Comcast Mot. Summ. Decision at 27, citing Investigation and Study Relative to the Adequacy and Effectiveness of Existing Licensing and Regulation of Cable Television Operations in the Commonwealth of Massachusetts (Cable Division, submitted to Massachusetts General Court, Joint Committee on Government Relations, January 1999).

³⁰¹ Framingham Mem. Summ. Decision at 31; see also id. at 33, citing Tr.III at 54–55.

³⁰² Id. at 31.

³⁰³ Framingham Mem. Summ. Decision Id. at 34

³⁰⁴ Framingham Opp. Comcast Mot. Summ. Decision at 26.

c. Analysis

Each party relies on its interpretation of Section 623 to support its position with respect to discounts provided to senior citizens. Section 623(d) contains the general requirement that cable operators maintain an “uniform rate structure.” Section 623 allows an exception to the general rule by deeming reasonable discounts to senior citizens nondiscriminatory. The subsection creates no obligations, and preserves existing state jurisdiction,³⁰⁵ except that the Cable Division may not prohibit a cable operator from offering reasonable discounts to senior citizens or other disadvantaged groups.

We contrast Section 623 (e)(1) with Section 623(e)(2), which permits franchising authorities to “requir[e] and regulat[e] the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals.” As Comcast argues, had Congress intended to leave local regulators with the authority to “require and regulate” senior discounts, it would have drafted subsection (e)(1) consistently with subsection (e)(2). Thus, the import of Section 623(e)(1) is only that a reasonable senior rate discount, if offered by the cable operator, must be accepted by the franchising authority.

In further support of its position, Framingham also relies on prior statements of the Cable Division. Framingham gives too much meaning to the Cable Division’s recognition that some operators voluntarily offer senior discounts and that such offers are occasionally made during license negotiations. The Cable Division’s statement that the issue of senior discounts is left to license negotiations was not intended to create a legal right of local franchising

³⁰⁵ G.L. c. 166A, § 15.

authorities to require senior discounts as a condition of approving a franchise. Rather, it was an observation that there is no federal or state law requirement to provide such a discount, and that such a term, like many other franchise terms that we address in this Order, may be offered by the cable operator as a bargained-for term during negotiations.

Moreover, as Harron demonstrates, senior discounts are not eligible for external cost treatment, but rather are simply discounts from established rates that may not be recovered from other ratepayers by charging a rate exceeding the maximum permitted rate established under the FCC's rules.³⁰⁶ Harron further states that senior citizen discounts are not the kinds of costs recoverable through a cost-of-service showing.³⁰⁷ The imposition of a senior citizen discount by an issuing authority would thus reduce a cable operator's revenues. It therefore follows that if a cable operator is to forgo such revenues, it must be voluntary and may not be imposed by an issuing authority. Thus, the refusal to offer a senior citizen discount may not be a factor in denying a license renewal as a matter of law. Nevertheless, we encourage the continuation of senior citizen discounts whether offered in the course of license negotiations or as a separate agreement, and we expect cable operators to honor all agreements to provide such discounts.

³⁰⁶ Harron at ¶¶ 9–10.

³⁰⁷ Id. at ¶¶ 9–11.